

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MORGAN HILL AND MORGAN HILL RETAIL VENTURE, L.P. FOR CERTAIN REAL PROPERTY CONSISTING OF APPROXIMATELY 66.5 ACRES LOCATED IN THE CITY OF MORGAN HILL AT THE NORTHEAST QUADRANT OF COCHRANE ROAD AND HIGHWAY 101**

**THE CITY COUNCIL OF THE CITY OF MORGAN HILL DOES HEREBY ORDAIN AS FOLLOWS:**

**SECTION 1.** California Government Code §65864 through §65869.5 authorizes cities and counties to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property.

**SECTION 2.** The City of Morgan Hill ("City") Municipal Code, Chapter 18.80 provides for procedures and requirements for Development Agreements.

**SECTION 3.** Morgan Hill Retail Venture, L.P. ("Developer") made application (DA-05-11) to the City to enter into a Development Agreement provided for in the Government Code and the City's Municipal Code in conjunction with its other applications for developing the 66.5 acres located at the northeast quadrant of Cochrane Road and Highway 101 (the "Property").

**SECTION 4.** After public notice, the Planning Commission and City Council held hearings on the proposed Development Agreement between the City and the Developer.

**SECTION 5.** The City Council certified the Environmental Impact Report regarding all the approvals for the Developer's proposed project on the Property, including, but not limited to, the Development Agreement.

**SECTION 6.** The City Council hereby finds that the Development Agreement approved by this Ordinance is compatible with the goals, objectives, policies, and land uses designated by the General Plan of the City of Morgan Hill.

**SECTION 7.** Effective Date Publication. This Ordinance shall take effect from and after thirty (30) days from the date of its adoption. The City Clerk is hereby directed to publish this Ordinance pursuant to §36933 of the California Government Code.

The foregoing ordinance was introduced, as amended, at the regular meeting of the City Council of the City of Morgan Hill held on the \_\_\_\_ Day of \_\_\_\_\_, 2005, and was finally adopted at a regular meeting of said Council on the \_\_\_\_ Day of \_\_\_\_\_, 2005, and said ordinance was duly passed and adopted in accordance with law by the following vote:

AYES: COUNCIL MEMBERS:  
NOES: COUNCIL MEMBERS:  
ABSTAIN: COUNCIL MEMBERS:  
ABSENT: COUNCIL MEMBERS:

ATTEST:

APPROVED:

\_\_\_\_\_  
Irma Torrez, City Clerk

\_\_\_\_\_  
Dennis Kennedy, Mayor

**∞ CERTIFICATE OF THE CITY CLERK ∞**

I, IRMA TORREZ, CITY CLERK OF THE CITY OF MORGAN HILL, CALIFORNIA, do hereby certify that the foregoing is a true and correct copy of Ordinance No. \_\_\_\_\_, adopted by the City Council of the City of Morgan Hill, California at their regular meeting held on the \_\_\_\_ Day of \_\_\_\_\_, 2005.

**WITNESS MY HAND AND THE SEAL OF THE CITY OF MORGAN HILL.**

DATE: \_\_\_\_\_, 2005

\_\_\_\_\_  
IRMA TORREZ, City Clerk

This Document is Recorded  
At The Request of  
The City of Morgan Hill  
And is Exempt from Fee  
Per Government  
Code Section 27383

When Recorded Return to:

City Clerk  
City of Morgan Hill  
Community Development Department  
17555 Peak Avenue  
Morgan Hill, CA 95037

## **DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MORGAN HILL AND MORGAN HILL RETAIL VENTURE L.P.**

THIS DEVELOPMENT AGREEMENT ("Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2005, by and between the City of Morgan Hill, a municipal corporation (the "City"), and Morgan Hill Retail Venture, L.P. ("Developer"), pursuant to the authority of Article 2.5, Chapter 4, Division 1, Title 7, Section 65864 et seq. of the Government Code relating to development agreements.

1. RECITALS. This Agreement is predicated upon the following facts and findings, which are an integral part of this Agreement:

1.1 Code Authorization. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic costs of development, the Legislature of the State of California adopted Section 65864 et seq. of the Government Code (the "Development Agreement Statute"), which authorizes the City to enter into a development agreement with any person/entity having a legal or equitable interest in real property providing for the development of such property and establishing certain development rights therein. Pursuant to Government Code Section 65865(c), the City Municipal Code establishes the authority and procedures for consideration of development agreements.

1.2 Property. The Property subject to this Agreement is that certain real property located in the City of Morgan Hill, County of Santa Clara at the northeast quadrant of Cochrane Road and Highway 101, as more particularly described in Exhibits A, B and C attached hereto and incorporated herein (the "Property"). The Property consists of approximately 66.5 acres of land and consists of three areas:

(a) The Sullivan Property, described in Exhibit A;

- (b) The Guglielmo Property, described in Exhibit B; and
- (c) The Millerd-Low Property, described in Exhibit C.

1.3 Interest of Developer. Developer or an Affiliate of Developer, holds or will hold as of the Effective Date, an equitable or a legal interest in the Property and has approval to build a shopping center for the Property (the "Project"), as shown on the site plan attached hereto as Exhibit D and incorporated herein.

1.4 Impact Fees and Reimbursements. Development of the Project will necessitate the financing and/or construction of significant improvements that will not only benefit the Project, but will benefit the entire area. The City recognizes that the success of the Project depends greatly upon the certainty of impact fees ("Impact Fees") and/or waivers or reimbursements of these fees and also upon the certainty of building permits and sufficient water and sewer capacity. Subject to the terms of this Agreement, the City agrees that Developer shall be entitled to the waiver or reimbursement of such Impact Fees and the reimbursement of other costs incurred in connection with Developer's construction of the Infrastructure Improvements (defined below) pursuant to the procedures set forth in Exhibit F attached hereto and incorporated herein by this reference for a period of ten (10) years after the Effective Date, and in the event Developer has installed the Infrastructure Improvements required for Phase I and Phase II of the Project during such ten (10) year period, Developer's rights to such waivers and reimbursements will be extended for an additional five (5) years if Developer has not been fully reimbursed pursuant to the terms and conditions of the Agreement, including without limitation, Exhibit F attached hereto. Notwithstanding the foregoing provisions of this Section 1.4 or any provision of this Agreement to the contrary, if Developer has not been reimbursed up to the full amount of the Project Reimbursement Limit (as defined in Exhibit F attached hereto) on or before the expiration of the fifteen (15) year period commencing on the Effective Date, Developer shall be entitled to receive any and all reimbursements owing under any Subsequent Development Reimbursement Agreement entered into pursuant to Section 3(B) of attached Exhibit F.

- The Impact Fees to be charged to the Project are set forth in their entirety in Exhibit E attached hereto and incorporated herein. Fees shall not be increased annually, per City ordinance, by the Engineering News Record annual escalation factor or any other factor, and the City will not impose any new Impact Fees created after the Effective Date on the Project, unless Developer does not meet the requirements of the Schedule of Development of Project, set out in Exhibit G attached hereto and incorporated herein, for Phase I and/or Phase II, in which case Impact Fees shall be subject to increase as provided in Exhibit G attached hereto.
- With regard to the Traffic Impact Fees, the City will apply the ITE Shopping Center rate of 2.66 trips per thousand square feet for the Project with the exception of a Cinema whose ITE rate shall be 18.43 trips per screen and any Grocery Store whose ITE rate shall be 5.75 trips per thousand square feet,

provided that Developer shall be reimbursed for the Impact Fee for a Grocery Store if Developer meets the Schedule for a Grocery Store set out in Exhibit F, Section 3.F.

1.5 Approvals. The City, in response to Developer's applications for land use entitlements to develop the Property and following public hearings and environmental analysis required by CEQA, has granted various land use entitlements for the Project to be built on the Property, which entitlements and approvals are described in the attached Exhibit H (the "Approvals") which is incorporated herein by this reference. Said Exhibit H also lists future land use entitlements and approvals necessary to implement the Approvals that have not been conferred as of the Approval Date, including, but not limited to, any approvals that will be required as a precondition to the issuance of grading, building or other permits required for the development of the Property (including the building, grading or other permits themselves), granted by the City after the Approval Date ("Subsequent Approvals"). In accordance with CEQA, the State CEQA Guidelines, and the City Environmental Guidelines, the City has determined the impacts of the Project have been analyzed and addressed in the Certified Final Environmental Impact Report ("EIR") and no further environmental review is required (CEQA Guidelines Sections 15162 & 15164). The City in accordance with its authority to approve Developer's application has placed certain Conditions of Approval on the Project, as set forth in the attached Exhibit I, which is incorporated herein. The City has determined that the Property shall be used for no other purpose than to construct and operate a shopping center, in accordance with the PUD approved for the Project during the Term of this Agreement. Construction and Design of the Project shall be of high quality similar to other similarly sized retail centers newly constructed in the Bay Area. For the reasons recited herein, Developer and City have determined that the development of the Property is a development project for which this Agreement is appropriate and that this Agreement:

1.5.1 Will eliminate uncertainty in planning and provide for the orderly development of the Property;

1.5.2 Insure progressive installation of necessary Infrastructure Improvements, by Developer in accordance with the terms and conditions of the Approvals;

1.5.3 Provide for public services appropriate to the development of the Property;

1.5.4 Insure attainment of the maximum effective utilization of resources within the City with the consideration of economic impacts to its citizens; and

1.5.5 Achieve the goals and purposes of the Morgan Hill General Plan, as amended.

The parties hereto acknowledge that the Agreement and any Project Approvals shall be the sole vehicle whereby the timing, phasing, and construction of the entirety of the Infrastructure Improvements and all other terms and conditions pertinent thereto shall be set forth, and agreed to by the parties. In exchange for these benefits to the City, together with the public benefits provided by the development of the Project pursuant to this Agreement, Developer desires to receive the vested right that it may proceed with development of the Project in accordance with Applicable Law in effect as of the Effective Date, Project Approvals, including without limitation, the Approvals and the Subsequent Approvals, and pursuant to the terms and conditions contained in this Agreement.

The parties shall cooperatively collect all documents mentioned in these recitals and place them in a three ring binder to be maintained at all times by the City Clerk. Two (2) true and correct conforming copies of the binder shall be prepared and given to the Developer and the Community Development Director of the City, respectively.

The City acknowledges that the development of the Property is a large-scale undertaking, involving major investments by Developer, with development occurring in various phases over several years. Developer is unwilling to incur the required investment in development of the Project as hereinafter defined without binding assurances from the City of the continuity of vested rights to develop the Project in accordance with the Applicable Law in effect as of the Effective Date and Project Approvals to proceed with the construction of the Infrastructure Improvements and/or any other improvements. The City, in turn, cannot be assured of realizing the benefits of the development of the Project without granting the binding assurances desired by Developer.

1.6 Infrastructure Obligations: Subject to the terms and conditions set forth in this Agreement, Developer agrees to construct those certain portions of the public roads, structures, improvements, sewer improvements, and storm drainage and retention basin improvements and any other necessary **public** improvements required by the Conditions of Approval ("Infrastructure Improvements") in phases as identified in the attached Exhibit J ("Phasing Plan") which is incorporated herein by this reference. The parties acknowledge that Developer shall not be required to initiate or complete development of any particular Infrastructure Improvement within any period of time except as provided in the Conditions of Approval and the Phasing Plan.

1.7 Public Hearings. On \_\_\_\_\_, 2005 the Planning Commission of the City of Morgan Hill, after giving notice pursuant to Government Code Sections 65867, 65090 and 65091 held a public hearing on Property Owners' application for this Agreement. The City Council of the City, after providing public notice as required by law, held a public hearing on the Agreement on \_\_\_\_\_, 2005.

1.8 City Council Findings. In approving the Agreement, the City Council has made appropriate findings that the provisions of this Agreement and the Project are consistent with the Morgan Hill General Plan, as amended and Vesting Tentative Map No. \_\_\_\_\_-2005, as well as all other ordinances, policies and regulations of the City of Morgan Hill, and that the requirements of CEQA have been satisfied.

1.9 City Ordinance. On \_\_\_\_\_, 2005 the City Council of the City, following a duly noticed hearing introduced Ordinance No. \_\_\_\_\_. On \_\_\_\_\_, 2005 ("Approval Date") the City Council of the City conducted the second reading and adopted Ordinance No. \_\_\_\_\_, approving and authorizing the execution of this Agreement. This ordinance became effective on \_\_\_\_\_, 2005 ("Effective Date").

NOW THEREFORE, in consideration of the terms and provisions of this Agreement, the parties agree as follows:

2. DEFINED TERMS. The terms used in this Agreement shall have the following meanings:

2.1 "Additional Fee Reimbursements" shall have the meaning set forth in Exhibit F, Section 1.

2.2 "Adjusted Impact Fees" shall have the meaning set forth in Section 1 of Exhibit G.

2.3 "Adjacent Property" shall have the meaning set forth in Section 3.B. of Exhibit F.

2.4 "Affiliate" means, with respect to Developer (a) any entity of which either JP DiNapoli Companies, Inc., a California corporation, or Browman Development Company, Inc., a California corporation, is the general partner, manager, managing member, or managing partner, or (b) any entity of which at least twenty five percent (25%) beneficial ownership interest is owned by John B. DiNapoli, J. Philip DiNapoli and Darryl Browman, collectively or individually.

2.5 "Agreement" means this Agreement, and all Exhibits, Schedules and Addenda attached hereto.

2.6 "Applicable Law of the Project" or "Applicable Law" shall have the meaning set forth in Section 5.1 of this Agreement.

2.7 "Approval Date" shall have the meaning set forth in Recital 1.9 above.

2.8 "Approvals" shall have the meaning set forth in Section 1.5 of this Agreement.

2.9 "Assignment" shall have the meaning set forth in Section 3.3 of this Agreement.

2.10 "Building Permits" shall mean site clearance permits, demolition permits, rough and final grading permits, building permits, including, but not limited to, all sub-permits for building such as plumbing, electrical and mechanical permits, permits issued under the Uniform Fire Code, certificates of occupancy and other permits required for physical construction.

2.11 "CEQA" shall mean the California Environmental Quality Act.

2.12 "City" means the City of Morgan Hill, California.

2.13 "Community Development Director" means the Community Development Director of the City, or such person as the City Manager shall designate to act as such for purposes of this Agreement.

2.14 "Conditions of Approval" means all conditions attached to the Approvals as set forth in the attached Exhibit H.

2.15 "Developer" shall mean Morgan Hill Retail Venture, L.P., its Affiliates or any of such parties, successors or assigns as permitted pursuant to Section 3.3 of this Agreement.

2.16 "Development Agreement Statute" shall have the meaning set forth in Section 1.1 of this Agreement.

2.17 "E&I Fees" shall have the meaning set forth in Section 2 of Exhibit E.

2.18 "Effective Date" shall have the meaning set forth in Recital 1.9 above.

2.19 "EIR" shall mean the Cochrane Road Planned Unit Development Environmental Impact Report certified by the City on \_\_\_\_\_, 2005.

2.20 "group of building permits" shall have the meaning set forth in Section 3.A.(iii) of Exhibit F.

2.21 "Impact Fee Reimbursement Limit" shall have the meaning set forth in Section 1 of Exhibit F.

2.22 "Impact Fee Study Improvements" shall have the meaning set forth in Section 3.D. of Exhibit F.



2.23 "Impact Fees" shall have the meaning set forth in Section 1.4 of this Agreement.

2.24 "Improvement Agreements" means the standard agreements required by the City to assure completion of the Infrastructure Improvements required by the Conditions of Approval for each of the Phased Maps.

2.25 "Infrastructure Improvements" shall have the meaning set forth in Section 1.6 of this Agreement.

2.26 "Manager" shall have the meaning set forth in Section 7.2 of this Agreement.

2.27 "Mortgage" shall have the meaning set forth in Section 12 of this Agreement.

2.28 "Non-Tax Generating Space" shall have the meaning set forth in Section 3.A.(iv) of Exhibit F.

2.29 "Parcel Maps" shall mean the various, phased parcel maps, which may hereafter be filed for record for each respective phase of development of the Project.

2.30 "Phased Maps" shall have the meaning set forth in Section 5.4 of this Agreement.

2.31 "Phasing Plan" shall have the meaning set forth in Section 1.6 of this Agreement.

2.32 "Project" is the densities, intensities, design and uses of the Property as depicted on the Project Approvals.

2.33 "Project Approvals" means all land use and building approvals, permits and entitlements granted by the City for the Project including, without limitation, Approvals, Subsequent Approvals, subsequent parcel maps or final maps and Conditions of Approval.

2.34 "Project Reimbursement Limit" shall have the meaning set forth in Section 1 of Exhibit F.

2.35 "Property" means that certain real property located in Morgan Hill, California, consisting of approximately 66.5 acres of land and more particularly described in Exhibits A, B and C.

2.36 "Property Owner" means the person, persons or entity having a legal or equitable interest in the Property and includes Developer's successors in interest.

2.37 "PUD" shall have the meaning set forth in Section 3.7 of this Agreement.

2.38 "Reimbursement Agreement" shall have the meaning set forth in Section 3.D. of Exhibit F.

2.39 "Reimbursement Determination" shall have the meaning set forth in Section 3.A.(i) of Exhibit F.

2.40 "Reimbursement Notice" shall have the meaning set forth in Section 3.A.(i) of Exhibit F.

2.41 "Rules and Regulations" means the rules, regulations, ordinances, laws, general or specific plans, zoning, and official policies governing development, design, density and intensity of permitted uses, growth management, environmental review, or other measure(s) that directly or indirectly limit the rate, timing or sequencing of development or construction, construction and building standards, design criteria and any other standards relating to development of Property within the City, and in effect on the Effective Date of this Agreement.

2.42 "Subsequent Approvals" has the meaning set forth in Section 1.5 above and shall include, but not be limited to, the following:

- (a) Parcel maps, as defined in Section 2.29 above;
- (b) Final map, adjusting boundaries of all or some of the parcels within the boundaries of the Vesting Tentative Map;
- (c) Use permits;
- (d) Building permits;
- (e) Architectural and Site permits;
- (f) Any other approvals as required by the City and/or any other agency or authority having jurisdiction over the Project, for the development of the Project.

2.43 "Subsequent Development Reimbursement Agreement" shall have the meaning set forth in Section 3.B. of Exhibit F.

2.44 "Tax Generator" shall have the meaning set forth in Section 3.A.(iii) of Exhibit F.

2.45 "Tax Generator Contract" shall have the meaning set forth in Section 3.A.(iii) of Exhibit F.

2.46 "Term" shall have the meaning set forth in Section 3.2.

2.47 "Vesting Tentative Map" shall mean the subdivision map whereby the Property will be divided into commercial parcels. A copy of the vesting tentative map is attached hereto as Exhibit K and incorporated herein by this reference.

### 3. GENERAL PROVISIONS.

3.1 Property Subject to the Agreement. This Agreement applies to and governs the development of the Property.

3.2 Term of Agreement. The Term of this Agreement shall commence upon the Effective Date and shall expire on the fifteenth (15<sup>th</sup>) anniversary following such date, unless extended by mutual agreement of the parties in writing; provided, however, (a) subject to the provisions of Section 8 below, if Developer has not taken fee title to a portion of the Property that is subject to this Agreement, within one (1) year of the Effective Date, this Agreement shall terminate as to that portion of the Property and (b) this Agreement may terminate earlier pursuant to the procedures set forth in this Agreement.

3.3 Transfers and Assignments. Prior to the completion of Phase I, (including the completion of all Infrastructure Improvements necessary for Phase I) Developer shall not assign or transfer any of its obligations under this Agreement without the prior written consent of the City, which consent shall be given or withheld in the City's sole discretion, unless the request is from a financial institution with a recorded interest in the Property, in which case such consent shall not be unreasonably withheld. After the completion of Phase I, Developer shall not assign, transfer or delegate any of its obligations under this Agreement without the prior written consent of the City, which consent shall be based on comparing the financial strength of the proposed assignee to the financial strength of Developer at the time of such proposed assignment, and which consent shall not be withheld if such assignee's financial strength is equal to or better than Developer's financial strength. Should Developer wish to assign any of its interest, rights or obligations under this Agreement, it shall provide the City with written notice of a proposed transfer, which notice shall specify the portion of the Property to be transferred by Developer and specify the obligations and benefits under this Agreement Developer wishes to assign, as agreed to by the proposed assignee. If the City's consent is to be based on comparing the financial strength of the proposed assignee to the financial strength of Developer as set forth above, Developer shall include with the notice of a proposed transfer, documents evidencing Developer's financial strength and the proposed assignee's proposed financial strength. If the City's consent to such assignment is required under this Section 3.3, the City shall have sixty (60) days to determine whether or not to consent unless the City determines it needs additional documentation to evaluate financial strength, and requests such additional documentation within thirty (30) days of the Developer's notice, in which case it shall then have an additional thirty (30) days from the date such documentation is received. Upon the City's consent to an assignment, where required, a written assignment

agreement (an "Assignment") shall be prepared by Developer, executed by Developer, the City and the assignee and recorded, which Assignment shall specify the terms and conditions of this Agreement assigned, the portion of the Property subject to such Assignment, and the interest in such portion of the Property to be acquired by the assignee. Any interests, rights or obligations under this Agreement not assumed by the assignee which are applicable to the portion of the Property to be acquired by such assignee shall be retained by Developer.

The City hereby consents to the transfer of the portion of the Property known as Major 1 to Target Corporation, a Minnesota corporation, provided that Developer prepares the Assignment described above. Developer shall not be required to obtain the City's consent to an assignment (a) in connection with the sale or lease of a subdivided parcel of the Property or all of the Property for which all Infrastructure Improvements are completed, all applicable fees paid, and all landscaping as required by the Conditions of Approval have been installed; (b) to an Affiliate of Developer; or (c) after the completion of Phase I of the Project, in connection with any assignment that does not assign or delegate any of Developer's obligations under this Agreement.

3.4 Recording of Development Agreement, Amendment or Cancellation. The City shall execute and acknowledge this Agreement immediately upon the Effective Date and within ten (10) days after the Agreement is fully executed, the City Clerk shall submit this Agreement for recording with the County Recorder. If the Parties or their successors-in-interest amend or cancel this Agreement, or if the City terminates or modifies this Agreement pursuant to Section 7 below for Developer's default, or pursuant to Section 3.5 because Developer has failed to acquire the fee interest to a portion of the Property, the City Clerk shall timely submit the notice of such action for recording with the County Recorder against the affected portion of the Property only.

3.5 Notice of Acquisition of Fee Title. Developer shall immediately notify the City of the close of escrow for the acquisition of fee title by Developer to any of the three properties listed in Recital 1.2. If Developer has not acquired fee title to any of the properties listed in Recital 1.2 within twelve (12) months of the Effective Date, subject to the provisions of Section 8 below then the City shall without Developer's consent, terminate this Agreement as to the property for which fee title has not been obtained.

3.6 Amendment or Cancellation of Agreement. Except as otherwise provided herein, including, without limitation, as provided under Section 6.8.4 hereof relating to the City's annual review, and Section 7 hereof, this Agreement may be cancelled, modified or amended only by mutual written consent of the parties, in accordance with Government Code Section 65868.

3.7 Amendment of Project Approvals. Upon the written request of Developer for a minor amendment or modification to any of the Project Approvals including, but not limited to, (a) the location of buildings, streets and roadways and other physical facilities, or (b) the configuration of the buildings, the site plan, elevations, the

configuration and/or number of parcels, lots or development areas, the Community Development Director shall determine whether the requested amendment or modification is consistent with this Agreement, the General Plan and Planned Unit Development ("PUD") and applicable provisions of the City Zoning and Subdivision ordinances in effect as of the Effective Date of this Agreement. For purposes of this Agreement, the determination of whether such amendment is minor shall be made by reference to whether such amendment or modification is minor in the context of the overall Project. If the Community Development Director in his/her sole discretion finds that the proposed amendment is both minor and consistent with Project Approvals and Applicable Law, the Community Development Director may approve the proposed amendment without notice and public hearing. If the Community Development Director determines the proposed amendment is not minor or is inconsistent with the documents listed above, the Community Development Director shall notice the proposed amendment for a public hearing at the Planning Commission and the City Council. For purposes of this Agreement and notwithstanding any City ordinance or resolution to the contrary, lot line adjustments, reduction and/or minor increases in the number of parcels, minor relocation of densities which do not materially alter the overall density of the Project, and design review (provided design review shall be subject to Section 6.6 below) shall be deemed a minor amendment or modification.

3.8 Binding Effect of Agreement. The provisions of this Agreement shall constitute covenants or servitudes, which shall run with the land comprising the Property, and the burdens and benefits hereof shall inure to the benefit of the City and Developer and all estates and interests in the Property and all successors in interest of the parties hereto.

#### 4. LAW; CONFLICTS OF LAW.

4.1 Controlling Law. This Agreement shall be governed by the laws of the State of California and the exclusive venue for any disputes or legal actions shall be the County of Santa Clara. Developer shall comply with all requirements of state and federal law, in addition to the requirements of this Agreement, including, without limitation, the payment of prevailing wages, if required. In any event, Developer shall pay prevailing wages for all work on off-site public improvements related to the Project.

4.2 Conflict of the City and State or Federal Laws. In the event that state or federal laws or regulations enacted after the Effective Date of this Agreement prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps or permits approved by the City, each party shall provide the other party with written notice of such state or federal restriction, a copy of such regulation or policy and a statement concerning the conflict with the provisions of this Agreement. The parties shall, within thirty (30) days, meet and confer in good faith in a reasonable attempt to modify this Agreement to comply with such federal or state law or regulation.

4.3 Council Hearings. After the parties have met and conferred pursuant to Section 4.2 hereof, regardless of whether the parties have reached an agreement on the effect of the change in the federal or state law or regulation upon this Agreement, the matter shall be scheduled for hearing before the Council. Written notice of such hearing shall be given, pursuant to Government Code Section 65867 or then applicable statute. The Council, at such hearing, shall determine the exact modification necessitated by such federal or state law or regulation and the Agreement shall be so amended. Developer, at the hearing, shall have the right to offer oral and written testimony.

4.4 Cooperation on Securing Permits. The City shall cooperate with Developer in the securing of any permits including without limitation the Santa Clara Valley Water District, which may be required as a result of modifications, amendments, or suspensions made pursuant to Section 4.2 hereof.

4.5 Invalidity of Agreement/Severability. If this Agreement in its entirety is determined by a court to be invalid or unenforceable, this Agreement shall automatically terminate as of the date of final entry of an unappealable judgment. If any provision of this Agreement relating to fees payable to Developer, shall be determined by a court to be invalid and unenforceable, or if any provision of this Agreement relating to fees payable to Developer is determined by a final unappealable judgment of a court of competent jurisdiction to be invalid or unenforceable according to the terms of any statute of the State of California which became effective after the Effective Date, and its application requires it to be retroactively applied, and Developer in good faith determines such provisions are material to its entering into this Agreement, then Developer may elect to terminate this Agreement as to all of its obligations remaining unperformed.

## 5. DEVELOPMENT OF THE PROPERTY.

5.1 Applicable Law. As used in this Agreement regarding the Property, the "Applicable Law of the Project" or "Applicable Law" shall mean and include all of the following, which are in effect as of the Effective Date:

- (a) The City of Morgan Hill General Plan;
- (b) The Planned Unit Development ("PUD") for the Property, including, without limitation, the PUD Guidelines;
- (c) The Vesting Tentative Map for the Project
- (d) Any use permit for the Property;
- (e) This Agreement;
- (f) City Zoning Ordinance;

- (g) City Subdivision Ordinance;
- (h) City design review regulations;
- (i) The terms and conditions of the Project Approvals;
- (j) Rules and Regulations;
- (k) All other laws, policies, rules and regulations of the City (whether the laws be enacted by the City Council, the City Planning Commission or the voters of the City of Morgan Hill) in effect as of the Effective Date, including, without limitation, the laws that relate to or specify any one or more of the following: the permitted uses of land or improvements and the density or intensity of use. Nothing in this Agreement, the Applicable Law, whether in existence as of the Effective Date or arising in the future, shall be interpreted to provide for or result in any annual (or other) limit, moratorium, or other limitation upon the number of, or phasing or pacing of, units which may be constructed on, or building permits which may be obtained for parcels and/or lots within the Property, the processing or approval of any vesting tentative or final map(s), or any other land use entitlements, approvals, or permits, or the rate, timing, or sequencing thereof, during the term of this Agreement. There are currently no adopted growth control ordinances, policies or measures that would restrict development of the Project. The terms of this Agreement are consistent with the legislative purposes set forth above and will assure Developer that approvals granted by the City in connection with the development of the Property will not change during the term of this Agreement.

5.2 Vested Right. During the term of this Agreement, Developer is assured, and the City agrees, that the development rights, obligations, terms and conditions specified in the Project Approvals and Applicable Law, including without limitation, any and all Subsequent Approvals and Developer's right to tie in, or connect to, the City sewer and water systems (provided that the Infrastructure Improvements related to those systems are improved by Developer as required by the Conditions of Approval), are and shall be fully vested in Developer and may not be changed or modified by the City, except as may be expressly permitted by, and in accordance with, the terms and conditions of this Agreement, or as expressly consented thereto by Developer in its sole discretion. The City also assures Developer that (i) the water system will have sufficient capacity to adequately service the Project's needs subject only to the conditions set forth in the Conditions of Approval of the approved Vesting Tentative Map for the Project and (ii) the sewer system will have sufficient capacity to adequately service the Project subject only to the conditions set forth in the Conditions

of Approval of the approved Vesting Tentative Map for the Project. Furthermore, the City agrees that it will comply with this Agreement, and with all Project Approvals, and will process same in accordance with the terms of this Agreement. The permitted uses, the density and intensity of use, the maximum height and size of proposed buildings, the construction, installation and extension of Infrastructure Improvements, development guidelines and standards, implementation programs for processing of Subsequent Approvals and other conditions of development for the Property shall be those set forth in the Project Approvals and Applicable Law, including without limitation, any and all Subsequent Approvals. The parties hereto intend that the Project Approvals and Applicable Law shall serve as the definitive and controlling document for all subsequent actions, discretionary or ministerial, relating to the development and occupancy of the Project.

5.3 Reservations or Dedications of Land for Public Purposes. Portions of the Property are to be reserved or dedicated by the Property Owners as shown in the Vesting Tentative Map and described in the Conditions of Approval. Such reservations and dedications are to be imposed in accordance with the Applicable Law in effect as of the Effective Date, and otherwise shall be made in accordance with the Subdivision Map Act and such Conditions of Approval to any Vesting Tentative Map(s) and/or Parcel Map(s), including, at the time required by the Subdivision Map Act and such Conditions of Approval.

5.4 Subsequent Enactments.

5.4.1 The City and Developer agree that this Agreement shall vest Developer's right to develop the Project pursuant to the Project Approvals and Applicable Law. Neither the City nor any agency of the City shall enact any new law, ordinance, resolution, initiative, rule, regulation or other measure applicable to the Project or Property that is in conflict with or places a greater burden on the Project than the Project Approvals or Applicable Law vested by this Agreement that prevents or conflicts with the permitted uses, density and intensity of uses as set forth in the Project Approvals, Applicable Law and this Agreement. Without limiting the foregoing general statement, and for all purposes relating to this Agreement generally, and this Section specifically, the parties agree that any new law, ordinance, resolution, initiative, rule, regulation or other measure applicable to the Project or Property shall be deemed to conflict with the Project Approvals and Applicable Law if it seeks to accomplish any one or more of the following results, either with specific reference to the Project or Property, or as part of a general enactment that applies to this Project or Property:

- (a) Limiting or reducing the intensity, use, operation or density of development on the Property, or otherwise requiring any reduction of the square footage of buildings, total number of buildings or other improvements;



- (b) Limiting or restricting the development timing or phasing or pace of the development of the Property in any manner;
- (c) Limiting the location of building sites, buildings, grading, or other improvements on the Property in any manner;
- (d) Applying to the Property a moratorium or other limitation affecting the processing or approval of subdivision maps, building permits or any other land use entitlements, approvals or permits, or the rate, timing or sequencing thereof;
- (e) Applying to construction on the Property "prevailing wage," "union shop," or other labor regulations or policies, except those required by State or Federal laws and regulations;
- (f) Requiring any additional on-site or off-site infrastructure improvements to be constructed or paid for by Developer or a subsequent Property Owner; or
- (g) Restricting the permitted uses of the Property in any manner.

5.4.2 The above list of actions is not intended to be comprehensive, but is illustrative of the types of actions that would conflict with this Agreement, the Project Approvals, and the Applicable Law.

5.4.3 Only the following changes to the Applicable Law effective as of the Effective Date shall apply to the development of the Project:

- (a) City land use regulations, ordinances, resolutions or policies adopted after the Effective Date, applicable city-wide, that are not in conflict with the terms and conditions for the development of the Project and the Project Approvals and which do not impose additional burdens on the Project or Property;
- (b) City land use regulations, ordinances, resolutions or policies adopted after the Effective Date, which are in conflict with Project Approvals, but the application of which to the development of the Project has been consented to in writing by Developer in its sole discretion;

- (c) Changes in the requirements for Building Permits adopted by the City; and
- (d) City bond issues, taxes and assessments for the construction or maintenance of a City facility or for the provision of City services, provided such a bond issue, tax or assessment is applied uniformly on a City-wide basis, or if affecting a smaller geographical area within the City, applied uniformly to such geographical area, and in a manner that does not discriminate against Developer, the Project or the Property.

Therefore, except for the exceptions expressly stated in subsection 5.4.3, the parties hereto agree no ordinance, policy, rule, regulation, decision, law or any other City action, or any initiative or referendum voted on by the public, which would otherwise be applicable to the Project and would affect in any way the development of the Project, alter construction standards for the Project, limit the number of building permits issued for the Project, and/or limit the Project's ability to connect to the City's sewer, water system, storm drainage systems or to receive any other City services, that was not in effect as of the Effective Date shall be applicable to the Project during the term of this Agreement.

5.5 Parcel Maps. Due to the size and scope of the proposed Project, the development and improvements of the Property may be completed in phases over the term of this Agreement in accordance with the Phasing Plan set forth in the attached Exhibit J. The Developer has prepared a Vesting Tentative Subdivision Map, and will prepare Parcel Maps and/or Final Map(s) for the entirety and/or a portion(s) of the Property. The conditions of approval that may be placed on such maps, or any other entitlement, permit, or approval (collectively the "Phased Maps") shall be governed by this Agreement, and shall impose no greater or earlier duty of performance on Developer than the Conditions of Approval or this Agreement. The parties hereto agree that, it is in the Conditions of Approval and this Agreement that the timing and extent of required Infrastructure Improvements have been set forth.

## 6. FEES, CREDITS, DEDICATIONS & INFRASTRUCTURE IMPROVEMENTS.

6.1 Impact Fees. Developer shall only pay those Impact Fees at the rate adopted by the City and effective prior to the Effective Date, specifically those fees set forth in the attached Exhibit E. Developer shall pay such fees for each building at the time the City issues a building permit for such building.

6.1.1 Building and Grading Permits. Upon application by Developer and payment of proper processing fees in accordance with the provisions governing such fees contained herein, including the application of reimbursements in lieu of said fees as provided in Section 1.4 above and Exhibit F, the City shall issue Building Permits to Developer consistent with the Project Approvals and this Agreement, as they may be amended. In addition, upon application by Developer, the City shall issue to Developer Building Permits consistent with this Agreement.

6.2 Development Timing. The parties acknowledge and agree that the Project will be developed in phases. Developer shall not be required to initiate or complete development of any particular phase of the Property within any period of time except as provided in the Conditions of Approval and Exhibit G to this Agreement. By entering this Agreement, Developer shall not be obligated to build any structures, make any improvements or otherwise develop the Property; provided, however, if Developer builds any structures, makes any improvements, or otherwise develops a phase of the Project, then Developer must comply with all applicable terms of this Agreement with respect to such phase and only such phase.

6.3 Fees, Conditions and Dedications. Developer shall make only those dedications, comply with only those conditions, and pay only those fees expressly prescribed in this Agreement.

6.4 Administrative Processing Fees. The City may charge Developer administrative processing fees for land use approvals and Building Permits that are in force and effect on a city-wide basis at the time those permits are applied for, provided such processing fees are not in violation of California State law, do not discriminate against Developer, reflect actual cost to provide such processing service in accordance with California State law and the City does not charge any new impact fees other than as set forth in Exhibit E attached hereto. The parties acknowledge that the City may increase or decrease such processing fees after the Effective Date subject to the City's procedures, codes, and policies and California State law, provided any such increase in fees shall be applied by the City on a uniform basis, and not in a discriminatory manner against Developer or the Project.

6.5 Police Power; Taxing Power. Except as set forth herein, the City shall not otherwise impose or enact any additional conditions, exactions, dedications, fees or regulations, through the exercise of either the police power or the taxing power, whether by direct City action or initiative or referendum, related to the development of the Project which are not in existence at the time of the Effective Date and as expressly permitted by this Agreement. The conditions, exactions, dedications, fees or regulations applicable to the Project as provided in the Project Approvals, or as provided in this Agreement, shall not be subject to modification or renegotiation by the City as a result of an amendment to any of the Project Approvals or of this Agreement, or as a result of the filing of any new subdivision map or parcel map, or any re-subdivision of the properties (including a merger or lot line adjustment or the creation of new lots); provided, however, that if the amendment to any of the Project Approvals, or the new map or resubdivision of the properties increases the square footage of the Project the City may

impose additional fees on the additional square footage, provided that these fees are charged at the same rate as such fees are charged for the rest of the Project and no new fees are imposed on the additional square footage, unless in accordance with this Agreement. Notwithstanding the foregoing, to the extent that City bond issues, taxes or assessments are adopted after the Effective Date, the Project shall be subject to City (i) bond issues, (ii) a special or general tax or (iii) special assessments for the construction or maintenance of a City facility or for the provision of City services, provided such bond issue, special or general tax or assessment shall be uniformly applied City-wide, or if a smaller geographical area within the City is affected, uniformly applied to such geographical area, and in a manner that does not discriminate against Developer, the Project or the Property.

6.6 Design Review. To the extent that the City has not previously approved final design details of a structure or improvement to be developed on the Property as part of the Project, the Architectural Review Board ("ARB"), on behalf of the City shall consider and approve such design details prior to issuance of a building permit for such structure or improvement. All City actions in approving, denying, or modifying such design details must be reasonable and consistent with this Agreement, Project Approvals and the Applicable Law in effect as of the Effective Date. If the ARB denies any design review for a structure or improvement that is part of the Property, the ARB will specify the modifications which are required to obtain design review approval. Any such specified modifications must comply with this Agreement, Project Approvals and the Applicable Law in effect as of the Effective Date. The City and Developer shall, with due diligence and in good faith, cooperate to obtain and issue design review approvals, and shall cooperate to require modifications rather than denying design review applications whenever reasonably possible. Design review shall not include any right to review and/or approve any use, proposed tenant and/or operation within the Property.

6.7 Life of Subdivision Maps. Pursuant to Government Code Section 66452.6(a), the term of any Vesting Tentative Map, Parcel Map, Final Map or any re-subdivision or amendment to any such maps (including any lot line adjustment or merger of lots within the properties) filed concurrent with or subsequent to the Approval Date of this Agreement shall automatically be extended for the term of this Agreement.

6.8 Cooperation-Implementation.

6.8.1 Processing. Subject to Developer's compliance with procedural requirements of the Applicable Laws, upon application by Developer, the City shall promptly commence and diligently proceed to complete all steps required or necessary for the implementation of this Agreement and the development by Developer of the Property in accordance with the Project Approvals, including, but not limited to, the following:

- (a) Scheduling, convening and concluding all required public hearings consistent with applicable laws and regulations in force as of the Approval Date.

- (b) Processing in an expeditious manner, all maps, improvement plans, land use permits, design review, building plans and specifications and other plans relating to the development of the Property filed by Developer, including, but not limited to, all parcel maps and final maps, re-subdivisions, amendments to maps, subdivision improvement agreements, lot line adjustments, encroachments, grading and building permits, associated zoning actions and related matters as necessary for the completion of the development of all lots and parcels comprising the Project. Developer shall, in a timely manner, provide the City with all documents, applications, plans and other information necessary for the City to carry out its obligations hereunder and shall use commercially reasonable efforts to cause Developer's planners, engineers, and all other consultants to submit in a timely manner all required materials and documents therefore. It is the express intent of the parties to cooperate and diligently work to implement any zoning, or other land use, grading or building permits or approvals which are necessary or desirable in connection with the development of the Project in substantial conformance with the Project Approvals. The City hereby agrees that it will accept from Developer for processing and review all development applications for development permits or other entitlements for the use of the Property in accordance with this Agreement.

6.8.2 Other Governmental Permits and Fees. In addition, Developer shall use commercially reasonable efforts to apply in a timely manner for such other permits and approvals as may be required by other governmental or quasi-governmental agencies, including, without limitation, districts and special districts providing schools, flood control, water, storm drainage, sewer, and fire protections, having jurisdiction over the Project in connection with the development of, or provision of services to, the Project. The City shall cooperate with Developer in its efforts to obtain such permits and approvals and shall, from time to time at the request of Developer, attempt with due diligence and in good faith to enter into binding agreements with any such entity necessary to assure the availability of such permits and approvals or services, provided such agreements are reasonable. The City shall use its best efforts to work with other governmental and quasi-governmental agencies so as to limit to the extent possible the imposition of additional fees, dedications or exactions by or through such agencies.

6.8.3 Indemnification. Developer agrees to indemnify, defend and hold harmless the City, its elected and appointed councils, boards, commissions,

officers, agents, employees, and representatives from any and all third party claims, costs and liability resulting from the performance under this Agreement by Developer, its contractors, subcontractors, agents, or employees, including, but not limited to, liabilities for Developer's failure to comply with Applicable Law. This provision is intended to be broadly construed and extends to, but is not limited to, any challenge to the validity of this Agreement or its passage, or approval by the City, City Council, Planning Commission or other advisory body. The City agrees to cooperate and assist Developer with any such claim, as long as such cooperation and assistance places no financial burden on City.

6.8.4 Annual Review. Each year during the term of this Agreement beginning in 2006, the City's Community Development Director shall in November, review the extent of good faith compliance by Developer with the terms of this Agreement. Such periodic review shall be limited in scope to compliance with the terms of this Agreement pursuant to Government Code Section 65865.1.

The Community Development Director shall make written findings and determinations, on the basis of substantial evidence, as to whether or not Developer has complied in good faith with the terms and conditions of this Agreement. Failure to complete said review by the end of each calendar year shall be deemed a finding of good faith substantial compliance. A finding by the Community Development Director of good faith compliance by Developer with the terms of the Agreement shall conclusively determine said issue up to and including the date of said review. If the Community Development Director finds and determines that Developer has not complied with such terms and conditions, or concludes the City Council should make such a determination, the Community Development Director shall provide Developer with a written notice of such determination, specifying where Developer has failed to comply with the terms and conditions of this Agreement, and the actions necessary for Developer to come into compliance with this Agreement. The Community Development Director shall then set the matter for a public hearing at the City Council not less than thirty (30) days but not more than sixty (60) days after such written notification to Developer. At the conclusion of the public hearing, the City Council shall make written findings and determinations, on the basis of substantial evidence, as to whether or not Developer has complied in good faith with the terms and conditions of this Agreement. If the City Council finds and determines that Developer has not complied with such terms and conditions, the City may terminate or modify this Agreement consistent with such findings. The City shall not impose any fees or other exactions as a condition to a finding of good faith compliance with the terms of this Agreement.

6.9 Condemnation Procedure. Condemnation of property, or any license, easement or other real property interest that is necessary for the construction of any Infrastructure Improvements, or the dedication of any real property(ies) upon which any of the Infrastructure Improvements are to be located shall occur in accordance with the Subdivision Map Act of the State of California and other Applicable Law. The Developer shall advance the monies to the City for any costs related to any such necessary condemnation and the City shall reimburse all such costs to Developer

pursuant to the terms and conditions of Exhibit F attached hereto and incorporated herein by this reference

7. DEFAULT; EFFECT THEREOF; WAIVER.

7.1 Default. Failure by either party to perform any material term or provision of this Agreement shall constitute a default, provided that the party alleging the default shall have given the other Party advance written notice and sixty (60) days within which to cure the condition. If the nature is such that it cannot be cured within that time, the party receiving notice shall not be in default if the party commences to perform its obligations within the sixty (60) day period and diligently completes performance. For the purposes of this Agreement, reference in Exhibit G, Section 1 to the Developer being in default shall be a default, the nature of which can be cured within sixty (60) days. Written notice shall specify in detail the nature of the obligation to be performed to cure such default by the party receiving notice.

7.2 Remedies. It is acknowledged by the parties hereto that the financial obligations of the City under this Agreement are limited to those amounts set forth in Section 1.4 and Exhibit F of this Agreement and the City would not have entered into this Agreement if it were to be liable for damages including, but not limited to consequential damages, under this Agreement in excess of the amounts set forth in Section 1.4 and Exhibit F. The City shall not be liable in damages in excess of the amounts set forth in Section 1.4 and Exhibit F to Developer, or to any assignee, transferee, or any other person, and Developer covenants not to sue for or claim any such damages in excess of the amounts set forth in Section 1.4 and Exhibit F. If the City Manager, or his designee ("Manager") determines that Developer is in default, and the default has not been cured within such sixty (60) days, or if Developer has not commenced such cure within such sixty (60) days, and thereafter diligently prosecutes such cure, he shall make his determination in writing setting forth his findings and determinations based on substantial evidence and notify Developer in writing. The Manager shall then set a public hearing at the City Council regarding the alleged default not less than thirty (30) days but not more than sixty (60) days after written notification to Developer. At the conclusion of the hearing, the City Council shall make written findings and determinations on the basis of substantial evidence to support the decision. The City Council may find Developer in default, not in default, or extend the time for curing the default. If the City Council finds Developer in default beyond all notice and cure periods, the City may terminate this Agreement without legal action.

7.3 Default by Developer. The City, may, in its discretion, refuse to issue Building Permits within the Property, if Developer has materially failed or refused to complete any requirement which is a condition precedent to the issuance of such a permit. This remedy shall be in addition to any other remedies provided for by this Agreement.

7.4 Effect of Default. In the event the City Council finds Developer in default of this Agreement pursuant to the procedure set forth in Section 7.2, all obligations of the Parties accruing after the date of such termination shall terminate with the exception of Developer's obligations to defend, indemnify and hold harmless the City, its officers, agents and employees as set forth in Section 6.8.3, Developer's obligations under any Improvement Agreements executed with the City for the Project and the City's obligation to reimburse Developer for Infrastructure Improvements constructed, and costs advanced to the City by Developer prior to the effective date of such termination. No termination shall prevent Developer from completing those portions of the Project in which it has a vested right to do so as defined by law independent of this Agreement, but the City may take any action permitted by law to prevent, stop or correct any violation of law occurring during and after construction and neither Developer nor any tenant of the Project shall occupy any building not authorized by a certificate of occupancy. Persons who are constructing a building shall not be considered to be occupying a building.

7.5 Waiver. Failure by any Party to invoke the default or termination provisions in this Agreement shall not waive that Party's right to insist upon performance of any obligation by the other Party in the future.

8. FORCE MAJEURE. All time periods specified in this Agreement, including without limitation, all exhibits, schedules and addenda attached hereto, shall be extended and performance by either party shall not be deemed to be in default where delays or defaults are directly due to war, terrorist acts, insurrection, strikes, lockouts, walkouts, riots, heavy floods, earthquakes, fires, casualties, acts of God, governmental entities other than the City, enactment of superseding state or federal laws or regulations or any lawsuit filed against the Project, the Property, any Approval related to the Project, including, without limitation, the Environmental Impact Report prepared for the Project, or in connection with Developer's acquisition of the title to the Property or any portion thereof. The City and Developer shall promptly notify the other Party of any delay hereunder.

9. NOTICES. All notices, demands and correspondence required or provided for under this Agreement shall be in writing and delivered in person or sent by certified U.S. mail, postage prepaid, return receipt requested. Notice shall be effective upon receipt when delivered in person or upon deposit in U.S. Mail if sent in accordance with the requirements of this Section. Notices to the City shall be addressed as follows:

To City:

City Manager  
City of Morgan Hill  
17555 Peak Avenue  
Morgan Hill, CA 95037

To Developer:

Morgan Hill DBP, L.P.  
c/o Darryl Browman, President  
Browman Development Company, Inc.  
100 Swan Way, Suite 206  
Oakland, California 94621



With a copy to:

City Attorney  
City of Morgan Hill  
17555 Peak Avenue  
Morgan Hill, CA 95037

With a copy to:

John B. DiNapoli, Vice President  
JP DiNapoli Companies, Inc.  
99 Almaden Blvd., Ste. 505  
San Jose, CA 95113

And to:

Mario Albert, Corporate Counsel  
Browman Development Company, Inc.  
100 Swan Way, Suite 206  
Oakland, California 94621

A party may change its address by giving notice in writing to the other party in the manner provided above. Thereafter, notices, demands and other correspondence pertinent to this Agreement shall be addressed and transmitted to the new address.

#### 10. MISCELLANEOUS PROVISIONS.

10.1 Rules of Construction. The singular includes the plural; "shall" is mandatory, and "may" is permissive.

10.2 Severability. The parties hereto agree that the provisions of this Agreement are severable. If any provision of this Agreement is held invalid, the remainder of this Agreement shall be effective and shall remain in full force and effect unless amended or modified by mutual consent of the parties.

10.3 Entire Agreement, Waivers, Amendments – Superseding. This Agreement constitutes the entire understanding and agreement of the parties. This agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiation or previous agreements between the parties with respect to all or any part of the subject matter hereof. To the extent there are conflicts or inconsistencies between this Agreement and any prior agreement, the provisions of this Agreement shall prevail. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the City or Developer. All amendments, which are authorized in the manner provided by law, must be in writing, signed by the appropriate authorities of the City and Developer, in a form suitable for recording in the Office of the Recorder, County of Santa Clara. Any such amendments shall be promptly recorded.

10.4 Termination of Agreement. This Agreement shall terminate upon the first of (a) the expiration of the Term, as may be extended pursuant to the terms and conditions hereof, (b) when all phases of the Property have been fully developed, all of Developer's obligations in connection therewith are satisfied as reasonably determined by the City or (c) due to termination pursuant to the terms and conditions set forth in this

Agreement. Notwithstanding the foregoing, if Developer requests, this Agreement shall terminate with respect to a phase of the Property when such phase has been fully developed and all of Developer's obligations in connection therewith are satisfied as reasonably determined by the City. Upon termination of this Development Agreement with respect to the entire Property or any phase therein, as the case may be, the City shall record in the Official Records of Santa Clara County, California, a notice evidencing such termination and completion of said development in a form mutually satisfactory to Developer and the City Attorney that the Agreement has been terminated with respect thereto. Notwithstanding the foregoing, the termination of this Agreement shall not terminate Developer's right to receive waivers or reimbursements of Impact Fees and other costs advanced by Developer pursuant to the terms and conditions of Exhibit F attached hereto.

10.5 Project is a Private Undertaking. It is specifically understood and agreed to by and between the parties hereto that: (a) the subject development is a private development; (b) the City has no interest or responsibilities for or duty to third parties concerning any improvements until such time and only until such time that the City accepts the same pursuant to the provisions of this Agreement or in connection with the various subdivision map approvals; (c) Developer shall have full power over and exclusive control of the Property subject only to the limitations and obligations of Developer under this Agreement; and (d) the contractual relationship between the City and Developer is such that Developer is an independent contractor and not an agent of the City. Notwithstanding anything contained herein to the contrary, if any provision of this Agreement results in an obligation of either of the parties under state or federal law that is contrary to the intent of the parties expressed herein, said provision shall be invalidated and severed from the Agreement and the rest of the Agreement shall remain in full force and effect.

11. COVENANTS RUN WITH THE LAND. Except as may otherwise be provided in this Agreement, each and every subsequent Property Owner shall be obligated and bound by the terms and conditions of this Agreement, and shall be the beneficiary thereof and a party thereto, but only with respect to the Property, or such portion thereof, sold, assigned or transferred to such subsequent Property Owner. Any such subsequent Property Owner shall observe and fully perform all of the duties and obligations of Developer contained in this Agreement, as such duties and obligations pertain to the portion of the Property sold, assigned or transferred to it.

## 12. MORTGAGEE PROTECTION.

12.1 No Obligations. The mortgage lender for any mortgage or deed of trust ("Mortgage") that is secured by the Property, or any portion thereof, who has come into possession and title to the Property, or any portion thereof, pursuant to a foreclosure of a Mortgage, or deed in lieu of such foreclosure, shall not be obligated under this Agreement to pay any fees or charges which are a liability of Developer or its successor in title to the real property within the Property that are secured by said Mortgage except for City taxes and assessments or to construct or complete improvements that are to be constructed by Developer under this Agreement, or to

guarantee such construction or completion. Such a mortgage lender shall otherwise be bound by all of the terms and conditions of this Agreement which pertain to the Property or such portion thereof in which it holds an interest. Such a mortgage lender shall not be eligible to apply for, receive, or exercise any of the Project Approvals for development with respect to the Property, or portion thereof which it owns which were vested in its predecessor in title prior to the time that the mortgage lender comes into possession, until the mortgage lender contractually assumes all of the obligations of its predecessor in title under this Agreement with respect to such property.

12.2 Notice to Mortgagee. If the City receives notice from a mortgage lender requesting a copy of any notice of default given Developer and specifying the address for service thereof, then the City shall deliver to such mortgage lender, concurrently with service thereof to Developer, any notice given to Developer with respect to any claim by the City that Developer is in default. If the City makes a determination of noncompliance hereunder, the City shall likewise give notice of such noncompliance on such mortgage lender concurrently with service thereof on Developer. Each mortgage lender shall have the right (but not the obligation) during the same period available to Developer to cure or remedy, or to commence to cure or remedy the event of default set forth in the City's notice.

13. ESTOPPELS. Either party may, at any time, and from time to time, deliver written notice to the other party requesting such party to certify in writing that, to the knowledge of the certifying party (i) this Agreement is in full force and effect and a binding obligation of the parties, (ii) this Agreement has not been amended or modified, or if so amended or modified, identifying the amendments or modifications, and (iii) the requesting party is not in default in the performance of its obligations under this Agreement, or if in default, to describe therein the nature of such default. The party receiving a request hereunder shall execute and return such certificate within twenty (20) days following the receipt thereof. The City acknowledges that a certificate hereunder may be relied upon by transferees and mortgagees of Developer.

14. NO THIRD PARTY BENEFICIARY. This Agreement shall not be construed or deemed to be an agreement for the benefit of any party other than the City and the Developer, and no such third party shall have any claim or right of action hereunder for any cause whatsoever.

15. MEDIATION. Any controversies between Developer and City regarding the construction or application of this Agreement, and claims arising out of this Agreement or its breach, shall be submitted to mediation within thirty (30) days after a written request of one party invoking mediation is served on the other party. The parties may agree on one mediator. If they cannot, the party demanding mediation shall request the Superior Court of the County of Santa Clara to appoint a mediator. The mediation shall not exceed eight (8) hours, unless an extension of time is mutually agreed to by both parties. The costs of mediation shall be borne equally by both parties. Mediation under this section is a condition precedent to filing an action in any court.

**IN WITNESS WHEREOF**, the parties have executed this Agreement as of the date written above.

CITY OF MORGAN HILL, a municipal corporation

MORGAN HILL RETAIL VENTURE, L.P., a California limited partnership

By: \_\_\_\_\_  
DENNIS KENNEDY, Mayor

By: MORGAN HILL DBP, L.P., a California limited partnership, its General Partner

By: JP DINAPOLI COMPANIES INC., a California corporation, its General Partner

ATTEST:

\_\_\_\_\_  
City Clerk

By: \_\_\_\_\_  
JOHN B. DINAPOLI, Vice President

APPROVED AS TO FORM:

By: BROWMAN DEVELOPMENT COMPANY, INC. a California corporation, its General Partner

\_\_\_\_\_  
City Attorney

By: \_\_\_\_\_  
DARRYL BROWMAN, President

STATE OF CALIFORNIA            )  
  ) ss:  
COUNTY OF SANTA CLARA    )

On \_\_\_\_\_ 2005, before me, the undersigned Notary Public, personally appeared DENNIS KENNEDY, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

STATE OF CALIFORNIA            )  
  ) ss:  
COUNTY OF SANTA CLARA        )

On \_\_\_\_\_ 2005, before me, the undersigned Notary Public, personally appeared JOHN B. DINAPOLI, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

STATE OF CALIFORNIA            )  
  ) ss:  
COUNTY OF SANTA CLARA        )

On \_\_\_\_\_ 2005, before me, the undersigned Notary Public, personally appeared DARRYL BROWMAN, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

**Exhibit A**

Sullivan, et al

**LEGAL DESCRIPTION**

Real property in the City of Morgan Hill, County of Santa Clara, State of California, described as follows:

Portion of Rancho La Laguna Seca, described as follows:

Beginning at the centerline of Cochran Road at the intersection thereof with the South prolongation of the East of line of the Cairns Tract, as shown on Map filed February 23, 1898 in Book "I" of Maps, page 91, Santa Clara County Records; thence North 52° 16' East along said centerline 956.34 feet and North 51° 02' East 1477.74 feet; thence leaving said road North 55° 15' West 1769.46 feet to a 3" x 4" redwood monument in the East line of the lands now or formerly of Cribari; thence South 10° West 2566.08 feet to the point of beginning.

Excepting all that portion thereof lying Southwest of the Northeast line of the South Valley Freeway, as conveyed to the State of California by Deed recorded October 19, 1970 in Book 9090, Official Records, page 714.

As the same is designated on Certificate of Compliance filed April 17, 1991 in Book L678, page 1398, Official Records.

APN: 728-37-004

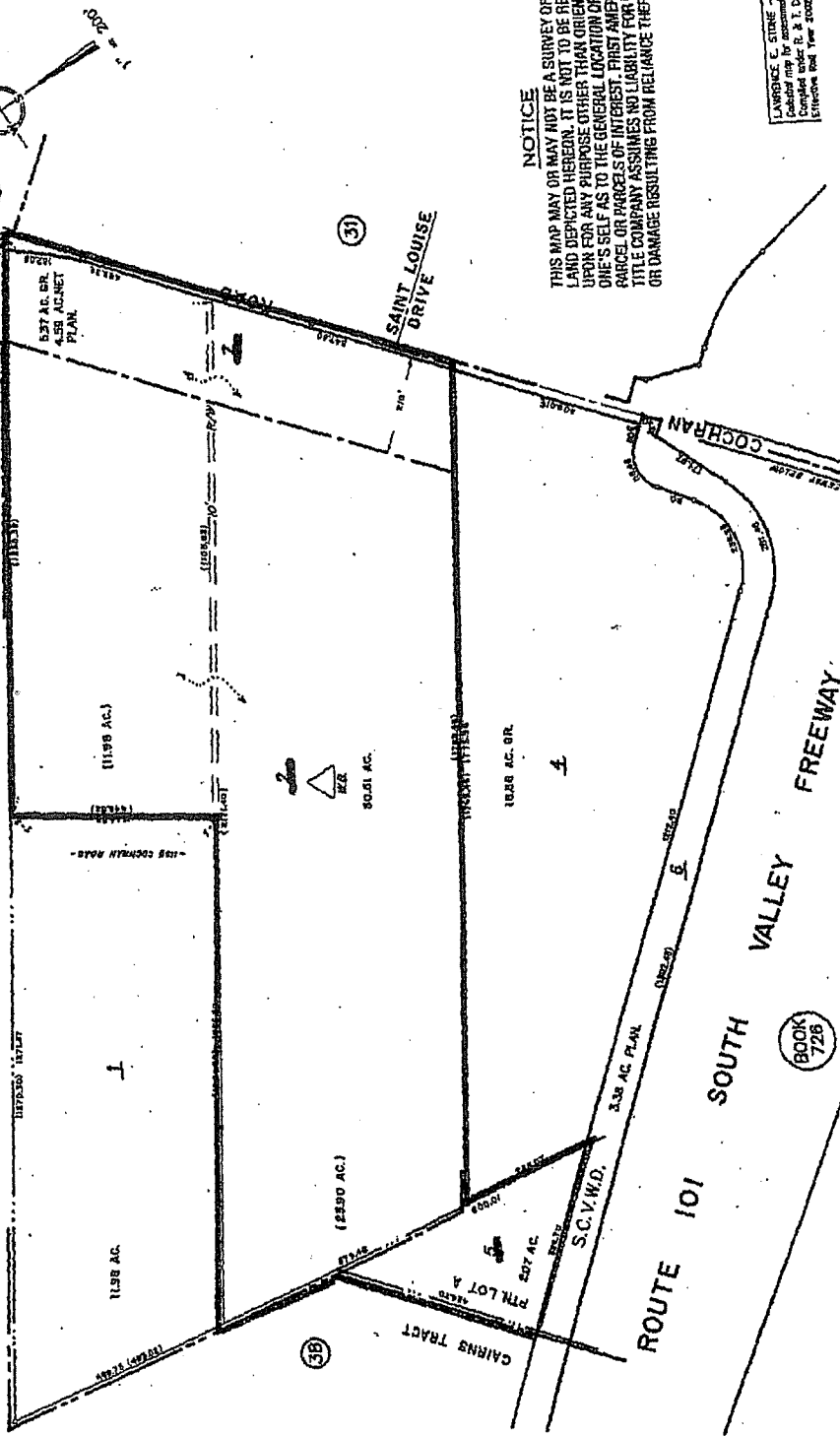
02/03

OFFICE OF COUNTY ASSESSOR — SANTA CLARA COUNTY, CALIFORNIA  
RANCHO LA LAGUNA SECA

R.O.S. 401/6

(38)

(39)



**NOTICE**  
THIS MAP MAY OR MAY NOT BE A SURVEY OF THE LAND DEPICTED HEREON. IT IS NOT TO BE RELIED UPON FOR ANY PURPOSE OTHER THAN ORIENTING ONE'S SELF AS TO THE GENERAL LOCATION OF THE PARCEL OR PARCELS OF INTEREST. FIRST AMERICAN TITLE COMPANY ASSUMES NO LIABILITY FOR LOSS OR DAMAGE RESULTING FROM RELIANCE THEREON.

LAWRENCE E. STINE — ASSESSOR  
Cadastral map for assessment purposes only.  
Compiled under Act No. 1, Code, Sec. 327.  
Effective from year 2000-2003

## **Exhibit B**

**Guglielmo**

### **LEGAL DESCRIPTION**

Real property in the City of Morgan Hill, County of Santa Clara, State of California, described as follows:

#### **PARCEL ONE:**

Beginning at the most Easterly corner of the 47.81 acre tract of land conveyed by Ellen Dady and John Dady, her husband, to Michael Michael Foley, by Deed dated December 19, 1895, and recorded December 19, 1895 in Book 186 of Deeds, at page 88, said point of beginning being in the center line of Cochrane Road; thence along the center line of said road North 51° 02' East 8.30 chains to the most Southerly corner of the 23.90 acre tract of land conveyed by Michael Foley and Margaret Foley, his wife, to John Dady by Deed dated October 28, 1903, and recorded November 19, 1903 in Book 273 of Deeds, at page 68, from which corner an iron pipe monument set on the Northwesternly line of said road bears North 55° 15' West 31 1/2 links; thence along the Southwesterly line of said 23.90 acre tract North 55° 15' West 32.90 chains to an iron pipe monument in the Easterly line of land conveyed by Cesar Plattl and Liberatta Plattl, his wife, to Michael Rogan by Deed dated March 3, 1862, and recorded March 8, 1862 in Book P of Deeds, at page 238; thence along the Easterly line of said land so conveyed to Rogan South 10° West 8.78 chains to the most Northerly corner of the 47.81 acre tract first above mentioned; thence along the Northeastery line of said 47.81 acre tract South 55° 15' East 26.81 chains to the point of beginning.

#### **PARCEL TWO:**

Beginning at a point in the center line of the Cochrane Road at the most Easterly corner of the 23.90 acre tract of land conveyed by Cynthia Skeels to G.A. McCarthy by Deed dated June 25, 1910 and recorded June 27, 1910 in Book 357 of Deeds, at page 572, said point of beginning being also the most Southerly corner of the 61 acre tract of land conveyed by Cesar Plattl and Liberatta Plattl, his wife, to Jose Jesus Bernal by Deed dated March 3, 1862 and recorded March 8, 1862 in Book P of Deeds, at page 238; running thence along the line between said 23.90 acre tract and said 61 acre tract, North 55° 15' West 18.718 chains to a stake marked T-2 standing at the most Easterly corner of the 11.98 acre tract conveyed by Emily L. Higgins to Stefano Traverso by Deed dated December 12, 1912, and recorded December 19, 1912 in Book 390 of Deeds, at page 301; thence along the Southeastery line of the said 11.98 acre tract South 34° 45' West 6.77 chains to a stake marked T-1 standing in the Northeastery line of the 23.90 acre tract of land conveyed by John Dady to Michael Foley by Deed dated November 13, 1902 and recorded November 19, 1903 in Book 273 of Deeds, at page 84; thence along said last mentioned line South 55° 15' East 16.755 chains to a point in the center of the Cochrane Road from which an iron pipe monument set on the Northwesternly line of said road bears North 55° 15' West 31 1/2 links; thence along the center line of said road North 51° 02' East 7.02 chains to the point of beginning.

#### **PARCEL THREE:**

A portion of that certain 8.560 acre parcel of land described in the Deed to the State of California, recorded May 6, 1971 in Book 9319, Page 130, Official Records, described as follows:



Commencing at the most northerly corner of said 8.560 acre parcel; thence along the easterly line of said parcel S.  $10^{\circ}14'47''$  W. 600.10 feet; thence N.  $39^{\circ}00'44''$  W. 396.70 feet to the Northwesterly line of said parcel; thence along last said line, N.  $51^{\circ}37'29''$  E. 454.70 feet to the point of commencement.

APN: 728-37-002 and 728-37-005 and 728-37-007.

OFFICE OF COUNTY ASSESSOR — SANTA CLARA COUNTY, CALIFORNIA

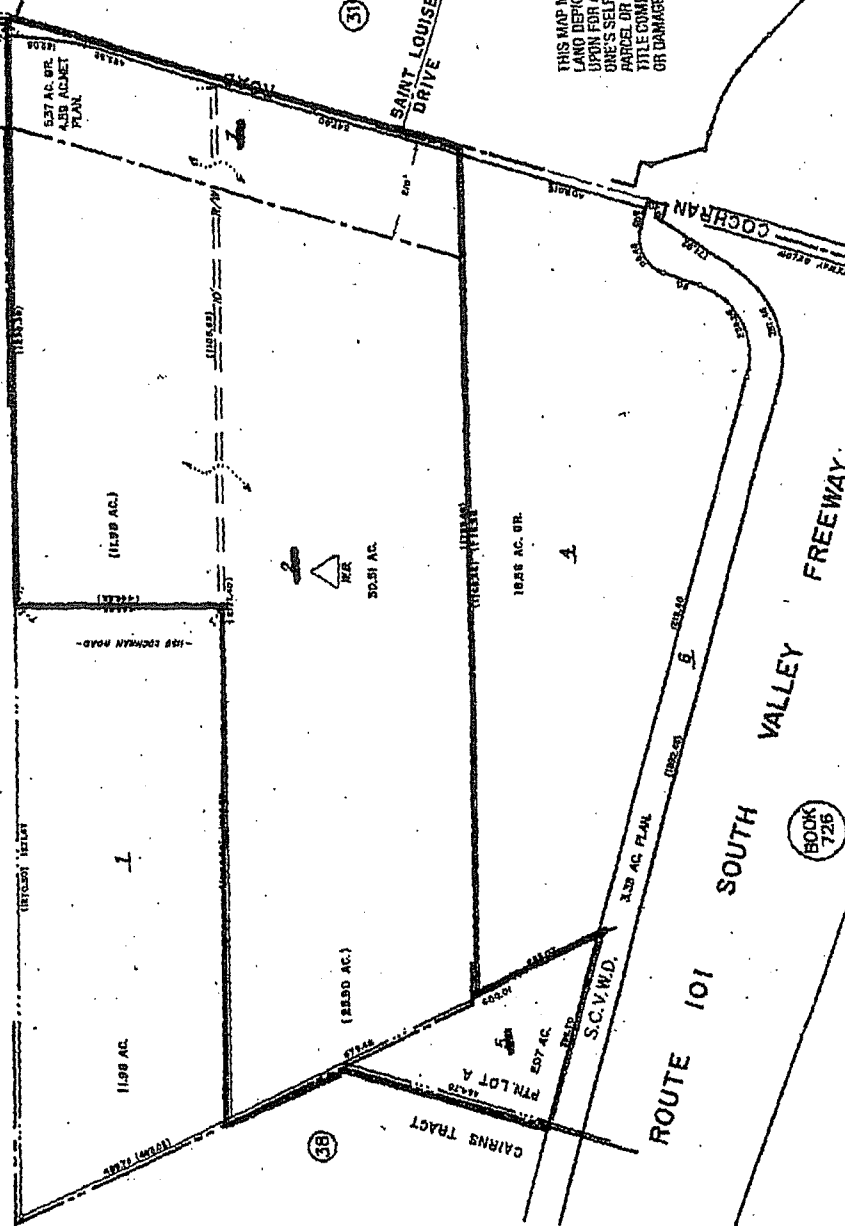
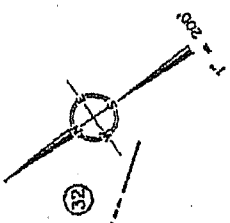
RANCHO LA LAGUNA SECA

02/03

R.O.S. 401/6

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LAWRENCE E. STONE - ASSessor  
Certified map for assessment purposes only  
Compiled under the S. C. Code, Sec. 37,  
Effective from Year 2002-2003

**Exhibit C**

Millerd-Low

**LEGAL DESCRIPTION**

Real property in the City of Morgan Hill, County of Santa Clara, State of California, described as follows:

Beginning at the most Northerly corner of that 23.90 acre tract of land described in the Deed from Cynthia Skeels to G.A. McCarthy dated June 25, 1910, recorded in Book 357 page 572 of Deeds in the office of the County Recorder of Santa Clara County, California; and running thence along the Northwesternly line of said 23.90 acre tract South 10° West 493.02 feet to an iron pipe monument standing at the most Westerly corner of said 23.90 tract; thence along the Westerly line of said 23.90 acre tract; thence along the Westerly line of said 23.90 acre tract South 55° 18' East 1064.58 feet to a stake marked T-1; thence North 34° 45' East 446.82 feet to a stake marked T-2 standing on the Northeastery line of said 23.90 acre tract; thence along said Northeastery line North 55° 15' West 1270.30 feet to the point of beginning.

Together with a right-of-way 10.00 feet wide from the Southerly corner of the above described land, along the Southwesterly line of the 11.98 acre tract of land adjoining on the Southeasterly line of above described land to Cochrane Road, as granted in the Deed from Emily B. Higgins to Stefana Traverso, dated December 12, 1912, recorded December 19, 1912 in Book 395 of Deeds, page 301, Santa Clara County Records.

APN: 728-37-001

